Supreme Court No. 98326-7
(COA No. 79793-0-I)

THE SUPREME COURT OF THE STATE OF WASHINGTON

ANTHONY WALLER,

Respondent,

v.

STATE OF WASHINGTON,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

ANSWER TO PETITION FOR REVIEW

NANCY P. COLLINS
Attorney for Respondent

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

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A. INTRODUCTION

This appeal is moot. Anthony Waller filed a motion seeking a new sentencing hearing under CrR 7.8. The trial court agreed to hold a hearing and asked the parties to file briefs on the permissible scope of the hearing. The prosecution immediately appealed the decision to set a hearing and insisted it had the right to appeal this decision.

In the meantime, the trial court reversed itself. It struck the CrR 7.8 hearing before it occurred. Mr. Waller's sentence was never altered. The petition for review obfuscates these basic facts and the controlling legal framework. It should be denied.

B. IDENTITY OF RESPONDENT AND DECISION BELOW

Mr. Waller respectfully requests this Court deny review of the Court of Appeals decision dated February 24, 2020.

C. ISSUE PRESENTED FOR REVIEW

Did the Court of Appeals appropriately construe the law and rule that a judge's decision to hold a future resentencing hearing was not an order that actually amended or vacated the sentence imposed and this preliminary ruling was not appealable of right under RAP 2.2(b)?

D. STATEMENT OF THE CASE

Anthony Waller was convicted of murder in the first degree, a crime he committed when he was 21 years old in 1999. The judge sua sponte imposed an exceptional sentence above the standard range. 4/7/00RP 22-23. At the sentencing hearing, no one told the court Mr. Waller was still struggling to complete high school and suffered from severe attention deficit disorder (ADHD). *See* CP 43, 45, 80-81.

In 2018, Mr. Waller filed a pro se motion for relief from judgment under CrR 7.8(b). CP 39-47. He argued the law had fundamentally changed governing the culpability accorded to young people based on advances in the science of brain development. *Id*.

The trial court eventually agreed to "schedule[ ]" a hearing on Mr. Waller's request for resentencing. CP 116-17. When the prosecution insisted the court clarify its ruling, the court explained it was ordering a resentencing hearing. CP 124. The court asked for briefing on the scope of the hearing, such as what information it could consider. CP 117. It never held this hearing, first staying its order at the prosecution's request and

later reversing its decision to hold any hearing. CP 146; Court of Appeals Slip op. 9-10.

The court initially agreed to hold a hearing because it was bound by the Court of Appeals decision in *Light-Roth*, which ruled that a retroactive change in the law construing the availability of exceptional sentences below the standard range entitled young adults to new sentencing hearings. *In re Pers. Restraint of Light-Roth*, 200 Wn. App. 149, 401 P.3d 459 (2017), *reversed by*, 191 Wn.2d 328, 422 P.3d 444 (2018).

Before any hearing occurred, the court stayed the proceedings at the prosecution's request once it filed this appeal. CP 146. Initially, the prosecution sought direct review in this Court, bypassing the Court of Appeals. S.Ct. No. 96051-8. After receiving briefing, this Court declined direct review and transferred the case to the Court of Appeals.[1]

[1] The petition for review mistakenly claims this Court "granted" direct review. In fact, this Court received the prosecution's request for direct review under RAP 4.2, set a timeline for it to file a statement of grounds for direct review followed by briefs, and noted it remained unclear whether the prosecution could directly appeal the order at issue. *See* Clerk's Letter, dated July 10, 2018, filed in S.Ct. No. 96051-8.

In the intervening time, this Court reversed the Court of Appeals decision in *Light-Roth*. After this Court's *Light-Roth* decision, the trial court sua sponte ruled it would not hold a new sentencing hearing. Court of Appeals Slip op. 9-10.

The Court of Appeals ruled the issue appealed is now moot. Slip op. at 9-10. It also ruled the prosecution does not have the right to a direct appeal of a preliminary court ruling setting a future hearing under CrR 7.8(b). *Id.* at 10-14.

E. ARGUMENT

The prosecution cannot appeal from a preliminary ruling setting a future hearing under the plain language of RAP 2.2(b) and controlling case law.

The Court of Appeals correctly ruled the court's order granting a request for a new sentencing hearing was not "a ruling that vacates judgment." Slip op. at 12. It explained, "[t]he uncontroverted record establishes the court did not amend the judgment and sentence." *Id.* at 13. The trial court did not alter the length or terms of the sentence or nature of the conviction. It did not issue a ruling that is subject to a direct appeal by the prosecution under RAP 2.2(b).

1. The prosecution does not have the right to appeal a preliminary order setting a future hearing under governing court rules and established law

"As this court has stated many times, unless authorized by statute, the State may not appeal an order that does not abate or determine an action." *State v. Smith*, 117 Wn.2d 263, 270, 814 P.2d 652 (1991). It is well established that the prosecution may not appeal a court order unless expressly authorized. *Id.*

RAP 2.2(b) dictates an exclusive list of the "only" instances where the prosecution may appeal a court decision in a criminal case. This list is different and far more limited than the orders a defendant in a criminal case may appeal. *Compare* RAP 2.2(a) *with* RAP 2.2(b). Under RAP 2.2(b), the prosecution may only appeal from a narrow set of final decisions, such as an order granting a new trial or an order vacating a judgment. RAP 2.2(b)(3), (4). It may appeal a sentence in a criminal case only if it is outside the standard range or contains a provision that is unauthorized by law. RAP 2.2(b)(6); *see also State v. Tracer*, 173 Wn.2d 708, 715, 272 P.3d 199 (2012) (explaining State's right to appeal under RAP 2.2(b)(1) where the court's action

"discontinued prosecution" and barred the State from pursuing a charge).

As the Court of Appeals recognized, RAP 2.2(b) does not authorize an appeal in the case at bar because the court had not yet decided whether it would alter Mr. Waller's sentence. Mr. Waller remained in custody, without bail, serving his sentence. The only relief the court granted was agreeing to hold a hearing on Mr. Waller's motion for relief from judgment filed under CrR 7.8. Slip op. at 13. It is "uncontroverted" that the court "did not amend the judgment and sentence." *Id*.

CrR 7.8(b) states that a motion for relief from judgment "does not affect the finality of the judgment or suspend its operation." Mr. Waller filed a motion for relief from judgment under CrR 7.8(b). Under the plain terms of this court rule, the court's consideration of this CrR 7.8(b) motion does not alter the finality of a judgment and it does not qualify as an appealable order. Contrary to the prosecution's depiction of events, considering a motion to vacate a judgment is a very different from granting that motion, and this consideration does not mean the court is vacating the judgment.

In its petition for review, the prosecution complains the Court of Appeals relied on a case that discussed "a completely different rule," *State v. Larranaga*, 126 Wn. App. 505, 108 P.3d 833 (2005). Petition at 7. But the Court of Appeals discussed *Larranaga* because it was a "case cited by the State." Slip op. at 13. The discussion of a case the prosecution relied on in its briefing is not a valid reason to fault the Court of Appeals opinion.

The Court of Appeals ruled *Larranaga* did not aid the prosecution's argument because it involved the *defendant*'s appeal, after the court denied his request for resentencing under CrR 7.8. 126 Wn. App. at 507. A different set of rules govern the defendant's right to appeal. RAP 2.2(a)(9) allows the defendant's appeal from an "order granting or denying a motion for . . . amendment of judgment," and RAP 2.2(a)(10), similarly gives a defendant the right to appeal an "order granting or denying a motion to vacate a judgment." *Id*. at 509.

The provisions of RAP 2.2(a) at issue in *Larranaga* do not apply to the prosecution in a criminal case. Instead, RAP 2.2(b) controls. RAP 2.2(b) uses different language than RAP 2.2(a)

and it does not permit the prosecution to appeal an order granting or denying a motion to amend a judgment. It only permits an appeal from the prosecution in a criminal case after a judgment is actually and affirmatively altered.

The prosecution notes two cases where it appealed court orders that set new sentencing hearings prior to the court actually pronouncing new sentences. Petition at 8 (citing *State v. Miller*, 185 Wn.2d 111, 371 P.3d 528 (2016) and *State v. Scott*, 190 Wn.2d 586, 416 P.3d 1182 (2018)). But the issue of appealability was never addressed in those cases. No one objected to the appeal, either because no one noticed the procedural flaw or the parties wanted appellate review and waived their objections.

Because these cases do not even discuss the legal theory posited by the prosecution, they cannot carve a new right for the prosecution to appeal despite the plain language of RAP 2.2(b). *See State v. Granath*, 200 Wn. App. 26, 35, 401 P.3d 405 (2017) (internal quotation omitted), *aff'd*, 190 Wn.2d 548, 415 P.3d 1179 (2018) ("An appellate court opinion that does not discuss a

legal theory does not control a future case in which counsel properly raises that legal theory.").

The Court of Appeals decision squarely applies settled law and the plain language of RAP 2.2(b). The trial court had not decided whether there was any reason to change Mr. Waller's sentence when the prosecution appealed.

Interim orders are generally subject only to discretionary review. RAP 2.3. When a court order does not constitute a final determination of a party's rights, it is appealable under the rules for discretionary review. *In re Turay*, 139 Wn.2d 379, 392, 986 P.2d 790 (1999). A final judgment under the RAPs means that the court's last action settles the rights of the parties and disposes of all issues in controversy. *State v. Taylor*, 150 Wn.2d 599, 602, 80 P.3d 605 (2003). There was no final judgment entered here. The prosecution did not seek discretionary review, presumably because it could not meet the necessary threshold showing that the court's order was both plainly erroneous and that it altered the status quo or rendered further proceedings useless. RAP 2.3(b)(1), (2).

2. The petition for review hinges on misrepresentation of the facts.

The petition for review is premised on a false pretense that the Court of Appeals appropriately rejected. The petition repeatedly insists the trial court's ruling affirmatively and specifically "vacated" the judgment against Mr. Waller. But the ruling did no such thing. Slip op. at 13. The only decision the court made was to order a resentencing hearing. CP 124. It also asked the parties to provide briefing to explain why type of evidence the court could consider at this resentencing hearing. CP 116-17. The court made no further decisions on Mr. Waller's sentence and did not decide the scope of resentencing hearing. Later, it withdrew its order granting the sentencing hearing without ever holding it.

Throughout this time, Mr. Waller has remained in custody pursuant to the original judgment and sentence.

The rule the prosecution asks to create would undermine CrR 7.8(b). It posits that all collateral attacks should be assessed by the Court of Appeals. Petition at 12. It claims anytime a judge agrees to consider a motion for relief from

judgment, the prosecution may directly appeal before the trial court assesses whether relief is warranted. *Id*. But appellate courts do not weigh in on a trial court's decision to set a future hearing. There is no reason for appellate courts to review a court ruling before the judge has even decided whether the claim has merit without meeting the discretionary review criteria of RAP 2.3(b). This Court should deny the prosecution's request to re-fashion RAP 2.2(b), render superfluous a trial court's authority under CrR 7.8(b), and permit appeals of non-substantive orders that simply agree to consider an issue but do not actually alter any aspect of the judgment or sentence.

The petition for review should be denied.

F. CONCLUSION

This Court should deny the petition for review pursuant to RAP 13.4(b).

DATED this 24th day of April 2020.

Respectfully submitted,

NANCY P. COLLINS (WSBA 28806)
Washington Appellate Project (91052)
Attorneys for Respondent

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner, v. ANTHONY WALLER, Respondent.	)))))))))	NO. 98326-7

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SIGNED IN SEATTLE, WASHINGTON THIS 24TH DAY OF APRIL, 2020.

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Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

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